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No. 82-220

In the Supreme Court of the United States

OCTOBER TERM, 1982

GERALD L. ARMSTRONG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (FORMERLY THE UNITED STATES COURT OF CLAIMS)

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner contends that, because Air Force officials erroneously told him that he was ineligible for disability benefits, the Veterans Administration should be estopped from invoking a statutory provision that precludes benefits from being awarded for the period prior to the date of a veteran's application in cases where an application is not filed within one year of discharge.

1. a. Petitioner sustained a knee injury in an Air Force Academy judo class while he was a cadet (Pet. 3). He was subsequently advised that surgery would be required on both knees to repair the injury and prevent future injuries. Successive operations in July 1976 and January 1977 did not successfully repair his knees (*ibid.*).

Petitioner graduated from the Air Force Academy in June 1977 and was commissioned as a second lieutenant; because of his knee problems, however, he was medically

discharged in January 1978. Petitioner alleges that he was advised by government personnel during discharge proceedings that he was not eligible for disability benefits because cadets were not considered to be on active duty (Pet. 3; Pet. App. A-1). He also claims that he received similar advice from "a person he believed to be supervisor of the Veteran's Administration Office in San Antonio, Texas" (Pet. 3), from the Office of the Air Force Legal Counsel, and from the Air Force Physical Evaluation Board (Pet. 3-4).

Relying on the advice of these various individuals, petitioner did not file a claim for disability benefits with the Veterans Administration but instead filed an action under the Federal Tort Claims Act for damages resulting from alleged negligence in the treatment of his knee injury (Pet. App. A-1 to A-2). The government answered that the tort action was barred under the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), because petitioner was on active duty for disability benefits purposes at the time of his injury (see Pet. App. A-2, A-4). Petitioner thereupon applied for disability benefits with the Veterans Administration in July 1981 and was awarded benefits for a 20% disability. Pursuant to 38 U.S.C. 3010(a), the benefits began to run from the date of his application (Pet. App. A-2).

Petitioner had amended his complaint in the tort action to state a claim for administrative abuse and equitable estoppel based on the misrepresentation alleged to have been made to him concerning his active duty status as a cadet (Pet. App. A-2). He sought as damages the benefits that he would have received from the date of discharge until the date of his application, had he applied for disability benefits within one year of his discharge. Since this amount exceeded $10,000, the district court transferred the case to

the Court of Claims pursuant to 28 U.S.C. 1406(c) (Pet. App. A-2).[1]

b. The Court of Claims granted summary judgment for the government (Pet. App. A-1 to A-5). It held that the Veterans Administration had no authority to award retroactive benefits since 38 U.S.C. 3010(a) expressly provides that, unless a claim is filed within one year of discharge, the effective date for payment of benefits shall be no earlier than "the date of receipt of application" (Pet. App. A-2). The court also held that the Veterans Administration's refusal to depart from this statutory limitation because of the facts of this case was unreviewable under 38 U.S.C. 211(a) (Pet. App. A-3). The court further held that petitioner's effort to avoid the statutory bar on the basis of estoppel was foreclosed by this Court's decision in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981) (Pet. App. A-3 to A-4). Finally, the Court of Claims declined to retransfer the tort aspects of petitioner's case to the district court, finding that transfer would not "be in the interest of justice" (28 U.S.C. 1506) (Pet. App. A-4 to A-5). The court explained that petitioner's negligence claim was foreclosed by *Feres* v. *United States, supra* (Pet. App. A-4), and that he could not prevail on a misrepresentation claim because the Federal Tort Claims Act excepts misrepresentation claims (28 U.S.C. 2680(h)) (Pet. App. A-5).

2. The Court of Claims correctly held that petitioner's estoppel claim is governed by this Court's decision in *Schweiker* v. *Hansen, supra*, and further review is unwarranted. This Court has consistently held that equitable estoppel may not be invoked against the government in

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[1]Effective October 1, 1982, the Court of Claims was abolished and its appellate jurisdiction transferred to the new United States Court of Appeals for the Federal Circuit. See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

order to avoid conditions imposed by statute or regulation. See *INS* v. *Miranda*, No. 82-29 (Nov. 8, 1982). Petitioner contends (Pet. 5-10) that this rule is inapplicable here because this case involves "affirmative misconduct" by the government. At the outset, we note that this Court has never applied estoppel against the government and has never stated that even affirmative misconduct would estop the government from enforcing valid laws and regulations. See *Schweiker* v. *Hansen, supra*, 450 U.S. at 788. It simply has not foreclosed the possibility that there could exist in some case affirmative misconduct that would justify an exception to the rule against estoppel.

Assuming arguendo that affirmative misconduct can estop the government, petitioner's claim nevertheless must fail. It is dubious whether he has made out an estoppel claim at all because he has not satisfied the reasonable reliance requirement of such a claim. Petitioner's failure to consult the relevant statute, which clearly establishes that he was on "active duty" at the time of his injury (see 38 U.S.C. 101(21)(D)), renders his reliance on the alleged misstatements unreasonable. See, *e.g.*, *Pratte* v. *NLRB*, 683 F. 2d 1038, 1043-1044 (7th Cir. 1982).

Furthermore, the conduct described here falls far short of affirmative government misconduct. The Court concluded that there was no affirmative misconduct in *Hansen*, and the facts here are different from those in *Hansen* only in the number of persons alleged to have erroneously advised petitioner that he was not eligible for veterans' disability benefits. There is no support for petitioner's suggestion (Pet. 5) of a conspiracy among the various Air Force employees who allegedly misled him; indeed, he does not assert that anyone deliberately intended to deceive him in order to deprive him of his benefits. Moreover, no employee of the Veterans Administration, the agency charged with administering the statute under which petitioner should

have applied for benefits, ever advised petitioner that he was ineligible.[2] As in *Hansen*, the erroneous advice petitioner may have received "did not cause [him] to take action, cf. *Federal Crop Insurance Corp.* v. *Merrill*, [332 U.S. 380 (1947)], or fail to take action, cf. *Montana* v. *Kennedy*, [366 U.S. 308 (1969)], that [he] could not correct at any time." *Schweiker* v. *Hansen, supra*, 450 U.S. at 789. Plainly, there was no affirmative misconduct here that justifies estopping the Veterans Administration from insisting on compliance with the statutory conditions for benefits.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1982

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[2]Petitioner states (Pet. 3) that he "was told by a person he believed to be supervisor of the Veteran's Administration Office in San Antonio" that he was ineligible for disability benefits. In fact, the record reflects that the individual, Bruce D. Gillikin, has never been employed by the Veterans Administration but is, and was at the time of the events in question, an employee of the Disabled American Veterans, a national service organization chartered by Congress as a non-profit corporation, totally separate from the Veterans Administration or any other federal agency. Affidavit of Bruce D. Gillikin, Appendix 2 to Defendant's Reply Brief filed March 12, 1982, in the Court of Claims.

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